FILE COPY

Office Supreme Co
F I L E D
NOV 27
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 546

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the MANHATTAN RAILWAY COMPANY, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street Spur, in the Borough of Manhattan, City of New York, and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever, of said Manhattan Railway Company, or by whomsoever owned, to construct, maintain and use said Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., Claimants against THE CITY OF NEW YORK in the above-entitled proceedings,

Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

CHARLES E. HUGHES, JR.,
Counsel for Petitioner William Roberts, Receiver of Manhattan Railway Company.

CHARLES FRANKLIN,
Counsel for Petitioner Manhattan Railway Company.

CARL M. OWEN,
J. OSGOOD NICHOLS,
Counsel for Petitioner Interborough Rapid Transit Company.

HAROLD C. MCCOLLOM,
MARTIN A. SCHENCK,
Counsel for Petitioner Central Hanover Bank and Trust Company, as Trustee, etc.

GEORGE WELWOOD MURRAY,
Counsel for Petitioner The Chase National Bank of the City of New York, as Trustee, etc.

SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

A. Summary Statement of the Proceedings and Decision Below 2

B. Specification of Errors 6

C. Reasons Relied on for Allowance of the Writ 7

BRIEF IN SUPPORT OF PETITION 9

Opinions of the Courts Below 9

Jurisdiction 10

Statement and Assignment of Errors 10

ARGUMENT 10

FIRST: The decree of the New York Court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily measured compensation therefor by the value of the easements as of the time of their acquisition by the railway, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes 10

SECOND: Due process of law was denied by the judgment that only junk value should be paid for the railway structure, which had been found to be suitable and well adapted to its purpose, and in awarding no compensation for the railroad's franchise and rights in the street 17

CONCLUSION 21

TABLE OF CASES CITED

PAGE

Boom Co. v. Patterson, 98 U. S. 403 15
Brooks-Scanlan Corp. v. United States, 265 U. S. 106 ... 19

Denver v. Denver Union Water Co., 246 U. S. 178 20

Goodin v. Cincinnati & Whitewater Canal Co., 18 Ohio State, 169 15

Hindley v. Manhattan Ry. Co., 185 N. Y. 335 11

In re Gales Street, 47 Wash. 603 15
In re The City and South London Ry. Co. and the Rector, etc. [1903], 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords) 15, 16

Jackson v. State, 213 N. Y. 34 ..... 19, 20

Lahr v. Metropolitan El. R. R. Co., 104 N. Y. 268 11
Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32 17

Manhattan Ry. Co. v. The Mayor, etc., of City of New York, 89 Hun., 429 ..... 18, 20
Matter of The City of New York (Blackwell's Island Bridge), 198 N. Y. 84 ..... 12, 18, 19, 20
Matter of City of New York (Allen Street), 256 N. Y. 236 20
Matter of the City of New York (Piers Old Nos. 8-11), 228 N. Y. 140 11
Mayor v. Manhattan Ry., 143 N. Y. 1 ..... 3, 17
Matter of Mayor, etc., of the City of New York, 39 App. Div. 589 20
Matter of Ninth Avenue and 15th Street, 45 N. Y., 729 .. 16
Monongahela Navigation Co. v. United States, 148 U. S. 312 13
Muhlker v. N. Y. & H. R. R. R. Co., 197 U. S. 544 ..... 11, 14

National Waterworks Co. v Kansas City, 62 Fed. 853 (C. C. A. 8th) 20
New York Telephone Co. v. State, 169 App. Div. 310, aff'd 218 N. Y. 738 ..... 17, 20

Olson v. United States, 292 U. S. 246 ..... 13, 14, 16, 21

PAGE

People ex rel. Manhattan Ry. Co. v. Barker, 165 N. Y. 305 12,14
People ex rel. Manhattan Ry. Co. v. Woodbury, 203 N. Y. 231 12
People ex rel. New York Elevated Ry. Co. v. Commissioners, 82 N. Y. 459 20
Scallon v. Manhattan Railway Co., 185 N. Y. 359 11
Story v. N. Y. El. R. R. Co., 90 N. Y. 122 ..... 3, 10, 11

TABLE OF STATUTES CITED

Chapter 606, Laws of New York, 1875 17
Chapter 788, Laws of New York, 1917 ..... 3, 4, 16
Chapter 611, Laws of New York, 1919 ..... 3, 4
Chapter 635, Laws of New York, 1923 ..... 3, 4
Railroad Law, Sec. 237 16
Judicial Code, Sec. 237, Act of Congress, September 6, 1916, Chap. 448, Sec. 2, 39 Stat. 726; Act of Congress, February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No.....

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the Manhattan Railway Company, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street Spur, in the Borough of Manhattan, City of New York, and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever, of said Manhattan Railway Company, or by whomsoever owned, to construct, maintain and use said Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of William Roberts, as Receiver of the Manhattan Railway Company, the Manhattan Railway Company (herein termed Manhattan), Interborough Rapid Transit Company (herein termed Interborough), Central Hanover Bank and Trust Company, as Trustee, and The Chase National Bank of the City of New York, as Trustee, for a writ of certiorari to review the judgment of the Supreme Court of the State of New York entered in the above entitled proceeding in the Office of the Clerk of the County of New York on September 13, 1934, upon the remittitur of the Court of Appeals of the State of New York dated July 3, 1934, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE PROCEEDINGS AND DECISION BELOW.

This is a proceeding brought by the City of New York to acquire the private and public street easements, railway structures and franchises constituting a part of the Manhattan Elevated Railway in the City of New York known as the 42nd Street Spur.

The petitioners are all claimants. The Manhattan-owned lines are operated by Interborough under a 999-year lease. Both Manhattan and Interborough are in receivership.

Central Hanover Bank and Trust Company is the Trustee under a first mortgage (securing $40,683,000 of bonds) and The Chase National Bank of the City of New York is the Trustee under a second mortgage (securing $4,523,000 of bonds) upon the Manhattan properties.

The judgment sought to be reviewed held that the claimants are entitled to compensation for the condemnation of the spur as follows:

1. For the elevated railway structure—$235, being the value when taken down, that is as *junk*.

2. For the public franchise to maintain the railway in the street and the public rights or estate in the street space occupied—*nothing*.

3. For the so-called private easements (property acquired from abutting property owners in respect of their easements of light, air and access)—$539,117.41, which figure was arrived at by taking a valuation, not as of the time of taking, but *as of the dates of acquisition by Manhattan* of the easements.

The spur was a free transfer shuttle built by Manhattan as part of its Third Avenue Line under a perpetual franchise and extended through East 42nd Street from a terminal opposite the Grand Central Station to Third Avenue (R. Ex. U, opposite p. 1932 of Claimants' Ex. AX).

The structure was the familiar elevated roadway and rails supported by girders resting upon iron columns sunk from 8 to 28 feet into the earth (R. Ex. AX, fol. 1010).

The perpetual public franchise had been duly granted by the State (*Mayor* v. *Manhattan Ry. Co.*, 143 N. Y. 1, 31-33); and the street space was occupied under the franchise.

After the granting of the franchise, and subsequent to the decision in *Story* v. *N. Y. Elevated Ry. Co.*, 90 N. Y. 122 (holding that the railway could not impair the easements of light, air and access of abutting owners, without compensation to them), Manhattan acquired during the years 1888-1904 undisputed title in fee to the private easements in question (R. Claimants' Ex. BX, p. 319).

The abutting owners, beginning in 1912, agitated the removal of the spur (R. Ex. AX, fols. 2474, 2478, 2493, 2481).

Condemnation was instituted by the City under the authority of Chap. 788, Laws 1917, as amended by Chap. 611, Laws 1919, and Chap. 635, Laws 1923, and pursuant to

Title 4, Chapter 17 of the Greater New York Charter. The statute of 1917 was permissive only and required the consent of Manhattan. The attitude of Manhattan was one of "complete opposition to the removal" (R. Ex. AX, fol. 3265). The statute of 1919 was then enacted providing that if the Public Service Commission should determine that the structure and appurtenances are no longer necessary or convenient to the public service, or constitute an impediment or obstruction to the public use of the street, and certain further procedural steps should be taken, the City should have the right to condemn and remove. The statute of 1923 made certain amendments not here material. On September 30, 1921 the City of New York instituted the proceeding and title vested on December 7, 1923.

The entire cost of acquiring the condemned property is borne, as to 65% by the owners of property abutting upon the line of the spur in whom the proceeding concededly revested title to the easements, and as to the remaining 35% by property-owners in an area of assessment extending from 34th Street to 50th Street and from Fifth to Second Avenues. The City bears no part of the cost (R. Ex. AX, 88).

The case was first tried in the New York Supreme Court by Mr. Justice O'Malley, the testimony and proceedings before whom are incorporated in the record in the four volumes of the record entitled "Exhibit AX". He found, as has not been disputed, that the *spur structure* "was suitable for and well adapted to the purposes of an elevated railway" (R. Ex. AX, 1983) and awarded its reproduction cost, less depreciation, $120,438 (126 Misc. 879; R. Ex. AX, 1984). For the *perpetual franchise* and the *public rights or estate in the street* he awarded $25,000 (126 Misc. 879, 911; R. Ex. AX, 1980). For the *private easements* he awarded $750,000, giving consideration to cost, franchise value, depreciation and other elements, rather than the pres-

ent reproduction cost (R. Ex. AX, 1981, 1982; 126 Misc. 879, 912). The claimants proved at the trial that as of the date of condemnation the market value of the easements determined by the difference between the value of the abutting property with full access of light and air and its value with these elements impaired by the railroad operation was $3,600,000 (R. Ex. AX, 852, 854, 869-872) and that it would have cost that sum to acquire these rights on that date. The City, as stated by the court, did not controvert this evidence. The court awarded also an undisputed item of $80,000, representing reconstruction costs at Third Avenue.

Upon cross-appeals, taken by all parties, the Appellate Division, First Department, reversed the final decree of Mr. Justice O'Malley, except as to the said undisputed item, holding that the structure should be valued as scrap, that the franchise and public street rights were of no value and that the value of the private easements should, upon a new trial, be determined solely "upon the basis of the value judicially determined at the time of the original acquisition" (1888-1904) (Opinion, R. 301, 305; 229 A. D. 617, 630).

The issues thus remitted were first tried before Mr. Justice Mullan, who died after rendering an opinion reported in 141 Misc. 565 (R. 331), and preparing a tentative decree, but before signing the final decree. Upon a retrial, Mr. Justice Ingraham, upon the same testimony, exhibits and rulings (R. 182), adopted the opinion of Mr. Justice Mullan (R. 341, 143 Misc. 129), awarding $235 for the structure as scrap, and for the private easements an amount based on their judicially determined value "at the time of their original acquisition". There was one easement (known in this proceeding as the "Depew Place easement") for which no compensation whatever was awarded. At the time the railroad was constructed, the plot to which this easement was

appurtenant (having a frontage of fifty feet on 42nd Street) was owned by the New York Central Railroad. In 1885, and before any prescriptive period had run in favor of the Railroad, the City purchased the plot and used it as a public street known as Depew Place. In 1905 the New York Central repurchased this plot and it thereafter remained in that private ownership. Mr. Justice Mullan held (141 Misc., pp. 568-570; R. 333-336) that title to this easement passed to Manhattan, not from the private owner, but from the City, immediately upon the latter's acquisition of title in 1885, by virtue of its franchise grant; but that, inasmuch as the Appellate Division had held the franchise to be without value, this easement could not be included in the award.

Upon cross-appeals taken by all parties, the Appellate Division approved the application of its rule of valuation made by the trial court and unanimously affirmed the final decree without opinion (R. 388; 238 App. Div. 832).

Cross-appeals to the Court of Appeals were taken by the same parties by leave of the Appellate Division both from its final order entered March 24, 1933 (R. 384), affirming Judge Ingraham's decision, and from its intermediate order dated May 9, 1930, reversing that of Mr. Justice O'Malley (R. 345-385). The Court of Appeals on July 3, 1934, affirmed the judgment (R. 410), two of the Judges dissenting, the majority opinion being written by Pound, *Ch. J.*, and the dissenting opinion by Lehman, *J.* (265 N. Y. 170).

Judgment on the remittitur from the Court of Appeals was entered September 13, 1934 in the Supreme Court (R. 427).

B. SPECIFICATIONS OF ERRORS.

The Supreme Court and the Court of Appeals erred:

1. In measuring the compensation for the private easements of light, air and access, acquired by Manhattan from

the abutting property owners, upon the basis of the value judicially determined at the time of the original acquisition of these rights, rather than at the time of the vesting of title herein, and in ignoring the availability of the property for sale or for other than railroad uses;

2. In awarding no compensation with respect to the private easement in connection with the Depew Place frontage;

3. In awarding for the elevated structure only its scrap value, and in not awarding therefor its structural value based on cost of reproduction less depreciation;

4. In awarding no compensation for the Railroad's franchise or its rights thereunder to occupy East 42nd Street.

C. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decree of the New York court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States. It violated the fundamental rule that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof, and ignored the availability of the property for sale or for uses for other than railroad purposes. The sole rule of valuation of the said easements adopted by the Appellate Division and affirmed by the Court of Appeals was "the value judicially determined at the time of the original acquisition of these rights", that is, 1888 to 1904 (R. 283, 305; 229 A. D. 617, 630). Available uses were not considered. Nor was market or sale value considered. No compensation whatever was made for the so-called "Depew Place easement" on the arbitrary ground that, although it was of great value

at the time of taking (R. 335), the Railroad's title thereto was derived from the public franchise which the New York courts held to be without value.

(2) The spur structure was found, as is not denied, to be "suitable for and well adapted" to the railway uses to which it was devoted (126 Misc. 879, 913; R. Ex. AX, 1983). It was a free transfer facility used on an average by over thirteen thousand passengers daily (R. Ex. AX, 573). The finding that it was worth $120,438 (R. Ex. AX, 1983) was reversed and a junk value of $235 has been awarded (R. 340). The spur was built to reach Grand Central Station under the requirements of the franchise. At the time of taking the structure was *real estate;* it was valued as *junked personalty.* The franchise to operate the spur was found by Mr. Justice O'Malley to be a part of the perpetual and profitable franchise of the Third Avenue Line (R. Ex. AX, 1956, 1958), and to have substantial value. He awarded for it and for the perpetual right to occupy 42nd Street, which he termed the public easement, $25,000 (126 Misc., p. 911; R. Ex. AX, 1980). The decree in this respect was reversed on the ground that the operation of the spur in and of itself was without profit, ignoring the fact that the spur and the Third Avenue Line were operated under a single franchise. Denial of *any substantial compensation* for the structure, and of *any value whatever* for an integral part of a franchise perpetual in terms and for the rights in the street thereunder, violated the Fourteenth Amendment.

It is submitted that, in respect of the matters set forth in subdivisions (1) and (2) of this heading C, the state court has decided federal questions of substance in a way contrary to the applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme

Court of the State of New York, entered in the above-entitled proceeding in the office of the Clerk of the County of New York, on September 13, 1934, upon the remittitur of the Court of Appeals of the State of New York, dated July 3, 1934.

Dated, New York, November 26, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company,
By CHARLES E. HUGHES, JR.,
Counsel for Petitioner.

INTERBOROUGH RAPID TRANSIT COMPANY,
By CARL M. OWEN,
J. OSGOOD NICHOLS,
Counsel for Petitioner.

MANHATTAN RAILWAY COMPANY,
By CHARLES FRANKLIN,
Counsel for Petitioner.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
By HAROLD C. MCCOLLOM.
MARTIN A. SCHENCK,
Counsel for Petitioner.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,
By GEORGE WELWOOD MURRAY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals (R. 410) rendered July 3, 1934, is reported in 265 N. Y. 170. The opinion of the Appellate Division, First Department, on the first appeal is reported in 229 App. Div. 617 (R. 283). The opinion of the Trial Court upon the initial trial is reported in 126 Misc. 879 (R. Ex. AX, 1933-1985). The opinion of Mr. Justice Mullan upon the first trial of the issues remitted by the Appellate Division is reported in 141 Misc. 565 (R. 331-340). The opinion upon the retrial of the remitted issues by Mr. Justice Ingraham (adopting that of Mr. Justice Mullan) is reported in 143 Misc. 129 (R. 341). The Appellate Division affirmed

Mr. Justice Ingraham's decision without opinion (238 App. Div. 832; R. 407-408).

JURISDICTION.

The judgment of the Supreme Court of New York, on the remittitur of the Court of Appeals, was entered on September 13, 1934 (R. 426-427). The jurisdiction of this Court is invoked under Judicial Code Section 237, as amended by Act of Congress, September 6, 1916, Chapter 448, Section 2, 39 Stat. 726, and Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937.

The constitutional questions relied upon were raised upon the record in all of the trials and appeals herein and upon the briefs and arguments (R. Ex. AX, 155-188; R. 93-140, 188-190, 195). The judgment of the Court of Appeals could not have been rendered without deciding them. These contentions are specifically referred to in the dissenting opinion of Lehman, *J.* (265 N. Y. p. 183; R. 421).

STATEMENT AND ASSIGNMENT OF ERRORS.

A statement of the facts and the errors relied on will be found in the petition.

ARGUMENT

FIRST: The decree of the New York Court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily measured compensation therefor by the value of the easements as of the time of their acquisition by the Railway, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes.

The origin of these private easements was the decision of the Court of Appeals of New York in 1882, in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, that the owners of

property abutting on the streets occupied by the elevated structures had easements of light, air and access, which were property within the meaning of the Constitution and which the State's franchise to the railroad to occupy the streets was incapable of conveying. It was held that the construction of the railroad was a "taking" of this private property, and this holding was necessary to the decisions, for the law did not permit recovery for consequential injury to private property caused by operations for public use, but only for its *taking* for such purpose.

The principles decided in the *Story* case were reaffirmed in *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, and have by repeated decision become a firmly established rule of property. *Muhlker* v. *New York & Harlem Ry. Co.*, 197 U. S. 544. The Appellate Division (229 App. Div., p. 623) quoted from a typical sample of the combination grant and release which was used upon the Railroad's acquisitions of these easements. See conveyances, R. Ex. AX, 1646-1717.

The City's contention that the "taking" by the Railroad Company of the abutter's easements was a taking by destruction and did not result in the acquisition by the Railroad of any property which it could continue to possess, has been foreclosed by the decisions of the Court of Appeals of New York. That court held in *Hindley* v. *Manhattan Railway Co.*, 185 N. Y. 335, that the railroad might acquire the easements by prescription. "Prescription rests upon the presumption of a grant * * *." (*Scallon* v. *Manhattan Railway Co.*, 185 N. Y. 359, 363.) "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right." (*Matter of the City of New York* (*Piers Old Nos. 8-11*), 228 N. Y. 140, 145.) These easements in the hands of the Railroad Company have been taxed as property. *People ex rel. Manhattan*

Railway Co. v. *Barker*, 165 N. Y. 305; *People ex rel. Manhattan Railway Co.* v. *Woodbury*, 203 N. Y. 231. In the *Barker* case, the Court said (p. 316):

> "The rights acquired are the easements of light, air and access of the abutting property owners in the streets occupied by the elevated railroad structure, and when these easements are acquired by the company its structure becomes lawful and its right to operate its road in front of the abutting property unquestioned. (*Messenger* v. *Manhattan R. Co.*, 129 N. Y. 502). The acquirement of these easements, it is true, destroys in a measure the value of the abutting property, but to the extent that such value is destroyed, that of the railroad company is increased. We think, therefore, that the fee damages represent property that may be assessed."

As Judge Lehman said in his dissenting opinion in the present case, "After the owner has been compelled to pay for the acquisition of these rights because the courts have held that they were property rights, and after such rights have been made subject to taxation by the State because they constitute property rights, it seems to me too late for the State to urge that it may destroy these rights without paying for them the value which the owner could otherwise have obtained as the price of their sale or abandonment" (265 N. Y., pp. 189-190; R. 420). See *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, 88.

The Court of Appeals in this case directed the affirmance of a decree which, under the instructions of the Appellate Division, measured compensation "upon the basis of the value judicially determined at the time of the original acquisition of these rights". The result has been to fix compensation upon what, except for the easements which had been acquired by prescription, was, as the majority opinion

of the Court of Appeals recognized (265 N. Y., p. 181; R. 412), a form of cost basis and, as to all the easements, upon the basis of values at dates remote from the time of the taking. We submit that this constitutes a taking of this property without due process of law in violation of the Fourteenth Amendment.

The rule that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof, is fundamental. In *Olson* v. *United States*, 292 U. S. 246, this Court, after observing that "the judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance", referred to its statement of the requirement in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324, of "a full and exact equivalent" for the property as an apt expression of the requirement of both the state and federal constitutions (pp. 254-255). The Court said (p. 255):

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money, *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306. *Jacobs* v. *United States*, 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d ed., §682, p. 1172. It may be more or less than the owner's investment. * * * It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases*, 230 U. S. 352, 454."

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the Railroad's easements and its value when not so subject, and this was the basis of the opinions of market value given by the undisputed

testimony of the Railroad's expert at the trial. See *People ex rel. Manhattan Ry. Co.* v. *Barker*, 165 N. Y. 305, 316; *Muhlker* v. *New York & Harlem R. Co.*, 197 U. S. 544, 571. The Appellate Division recognized (229 App. Div. 624; R. 295) that these easements "have been judicially valued as representing the amount which has been taken from the value of the abutting property after allowing for all benefits received". But the Appellate Division and the Court of Appeals held that this method must be applied to real estate values at the time of the Railroad's acquisition of the property between the years 1888 and 1904 instead of such values at the time of the condemnation in 1923.

The New York courts' theory that compensation must be determined by conditions existing at the time of the Railroad's acquisition led to the anomalous result that no compensation whatever was awarded with respect to the so-called "Depew Place easement", which, at the time of the condemnation, was no different in character or value from the other easements taken.

Furthermore, the New York courts based their decision in great part upon the ground that the Railroad's operation of this spur taken by itself was not profitable. We submit that, in thus limiting consideration to the Railroad's use of the property and ignoring its availability for other uses, this also violated the constitutional guaranty. This Court, in *Olson* v. *United States*, said (pp. 255-256):

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely

> to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U. S. 227. 2 Lewis, Eminent Domain, 3d ed., §707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., §220, p. 671."

And this Court further said that its prior decision in *Boom Company* v. *Patterson*, 98 U. S. 403, cited in the passage above quoted, "is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment" (292 U. S., p. 259). Among the judicial applications of this rule are the following, which are particularly apposite to this case: *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Oh. St. 169; *In re Gales Street*, 47 Wash. 603. See also *In re The City and South London Ry. Co. and The Rector, etc.* [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords).

Judge Lehman said in his dissenting opinion (265 N. Y., p. 187; R. 418):

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner."

This conception of the availability of these easements for use by the abutting owners and the possibility of sale thereof to them was by no means speculative, as the New

York courts appear to have supposed; nor does it infringe the rule that the value to be ascertained does not include "any element resulting subsequently to or because of the taking" (see *Olson* v. *United States*, 292 U. S., p. 256). Under Section 237 of the New York Railroad Law, the Railroad had for years before the condemnation had the right, by the required corporate action, to make a declaration of abandonment of any portion of its route subject to approval thereof by the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. So did the first permissive statute looking towards the removal of this very spur (Laws 1917, c. 788). The relatively small number of abutting owners and their active desire to be rid of the spur satisfies every requirement of practicability of such a disposition.

The proceeding, in effect, was one whereby at the instance of the property owners the structure was removed and the easements were restored to them, the cost being imposed upon them. This situation was clearly recognized by the Appellate Division (229 App. Div. 617, 624; R. 295). The condemnation freed the property from any limitations of railroad user. (*Matter of Ninth Avenue and 15th Street*, 45 N. Y. 729, 732, 733, 735; *In re The City of South London Ry. Co. and The Rector, etc., supra.*

As Judge Lehman said in his dissenting opinion (265 N. Y., p. 191; R. 421):

> "The amount fixed by the courts below as the present value of the property rights bears no relation to any value which might be obtained from user of the property, or as the price of its abandonment or transfer. It is purely arbitrary. It may be greater or less than the value. Property is taken without due process of law when the compensation paid is fixed arbitrarily rather than by a determination of the value which might be obtained from user and sale."

SECOND: Due process of law was denied by the judgment that only junk value should be paid for the railway structure which had been found to be suitable and well adapted to its purpose and that no compensation should be made for the Railroad's franchise and rights in the street.

The spur was built under a franchise granted to Manhattan and its predecessor, New York Elevated Railway Company, *requiring* connection "with other steam railways or the depots thereof" (which included the Grand Central Station). Section 36, Chapter 606 of the Laws of 1875 (Rapid Transit Act) (R. Ex. AX, 1877, 255-256, 1621); *Mayor* v. *Manhattan Ry.*, 143 N. Y. 1, 31, 32, 33 (R. Ex. AX, 1249, 1326, 1374, 1375, 1528; Claimants' Ex. D, opposite page 1902, R. Ex. AX). It was found and not disputed that it "was suitable for and well adapted to the purpose of an elevated railway" (R. Ex. AX, 1983). When taken it daily accommodated an average of 13,421 passengers on the basis of counts taken by the City and claimants (R. Ex. AX, 572-573). Its use was increasing (Claimants' Ex. K-6, opposite page 1920, R. Ex. AX; Opinion, R. Ex. AX, 1949) and was then greater than in most years of its operation. The dangerous congestion of 42nd Street required a determination by the Public Service Commission that public convenience and necessity would be subserved by the spur removal; but property devoted to public convenience under a franchise requirement and adequately serving its required function cannot be confiscated by an award of nominal "junk value".

The acceptance of the franchise and the providing of the spur structure under its requirement constituted a contract between the State and the Company which was property protected by the Constitution (*New York Telephone Co.* v. *State*, 169 App. Div. 310, aff'd. 218 N. Y. 738; *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32).

The elevated structures erected under the Manhattan franchise cannot be taken without just compensation (*Manhattan Ry. Co.* v. *Mayor*, 89 Hun 429, 431).

Mr. Justice O'Malley, citing and following *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, held that the structure should be valued at reproduction cost less depreciation; that claimants' experts calculated this amount at $185,513, and the City's experts at $120,438; that the difference resulted largely from the greater depreciation claimed by the City's experts; and that the value given by the City's experts should be adopted (126 Misc., pp. 879, 912-913; R. Ex. AX, 1984). He held that the franchise had value and awarded for it, and the perpetual right to occupy 42nd Street, $25,000 (126 Misc., p. 911; R. Ex. AX, 1980).

The judgment appealed from awards a nominal junk value of $235 for the structure and nothing for the franchise. The ground of this holding was that operation of the spur was not profitable (229 App. Div., pp. 620, 622; R. 290; 265 N. Y., p. 182; R. 414). However, neither appellate court disapproved the holding of Mr. Justice O'Malley, that while the spur, taken by itself, showed an operating loss

> "It was an integral part of an elevated railroad system which is shown upon the evidence to be operated on a paying basis * * *. Steam railroads, no doubt, have many spurs and switches which may be maintained and operated at a loss to the companies, yet their maintenance and operation may promote the maintenance and operation of the complete railroad system and thus lend some value to their franchises" (126 Misc., p. 896; R. Ex. AX, 1956).

Mr. Justice O'Malley also referred to the possibility that the Manhattan-Interborough lease might be terminated (both companies have since gone into receivership), in which event

the spur might be of great value to the Manhattan's Third Avenue line, in competition with the Interborough Lexington Avenue line, especially as the Manhattan in separate operation would not be limited to a five-cent fare; and held (citing *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 125, 126) that such facts should be taken into consideration with the other circumstances (126 Misc., p. 897; R. Ex. AX, 1957-8).

The Court of Appeals, while also recognizing that the spur was part of a system "operated at a profit," held that "the finding that the Forty-second street franchise had no value should not be disturbed" (265 N. Y., p. 182; R. 414). There has in fact never been any finding, except in the most limited sense, that the franchise had no value. It has been found that the spur produced an operating loss; but equally it has been found that the spur was a part of a system operated at a profit. The railroad franchise, when accepted and acted upon, was an entire contract, not a collection of parts. See *Grand Trunk Western Ry. Co.* v. *South Bend,* 227 U. S. 544, 555-556, wherein this Court held that an attempt to terminate a part of the franchise by reason of traffic congestion was a violation of the contract clause of the federal constitution.

Manhattan consistently opposed the condemnation of the spur (126 Misc., pp. 883, 885, 899, 914; R. Ex. AX, 1936, 1939, 1961, 1985; 229 App. Div. 620; R. 288). Morever, it is the settled law of New York that under the theory of condemnation the property is taken from the owner "against his will" (*Matter of City of New York (Blackwell's Island Bridge),* 198 N. Y. 84, 86; *Jackson* v. *State,* 213 N. Y. 34, 35).

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, the cost of reproduction less depreciation is

ordinarily the proper measure of value, both in rate litigation (*Denver* v. *Denver Union Water Co.*, 246 U. S. 178), and in condemnation (*Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84; *New York Telephone Co.* v. *State*, 169 App. Div. 310, 321; aff'd. 218 N. Y. 738). The award by Mr. Justice O'Malley was based upon the lowest estimate in the record. Where the property is a profitable concern, it may be given a going value *additional* to reproduction cost less depreciation (Brewer, Sanborn and Thayer, *JJ.*, in *National Waterworks Co.* v. *Kansas City*, 62 Fed. 853, 865 (C.C.A. 8th); *Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 185-6). We have seen no decision which holds that where property taken is a part of a profitable system, the constitutional protection against confiscation is to be denied because the particular part taken produces an operating loss. As an example to the contrary, see *Matter of Mayor*, 39 App. Div. 589, wherein a reserve gas plant, which had not been in use for several years but had been kept up, was allowed not only structural value but also going value, although obviously its ownership must have produced operating loss, not profit.

The structure was real estate (*People ex rel. N. Y. Elevated R. Co.* v. *Commrs.*, 82 N. Y. 459, 462; *Manhattan R. Co.* v. *Mayor*, 89 Hun 429, 431). It was error to value it as detached junked personalty (*Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 191). The City takes, and must pay for, annexed property "as it then exists"—that is, as realty (*Matter of City of New York (Allen Street)*, 256 N. Y. 236, 241). In *Jackson* v. *State*, 213 N. Y. 34, the Court reversed an award for fixtures because they had been valued not as real estate but as "second-hand articles" severed from the warehouse. The Court, per Cardozo, *J.*, said that such a valuation was "intolerable". In effect, the valuation herein

was not as of the time of taking but as of a subsequent date—that is, after removal,—contrary to the established rule which is inherent in due process (*Olson* v. *U. S.*, 292 U. S. 246, 255).

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves but provided under franchise requirements by railway and public service corporations, is involved in the determination of the question here raised relating to the structure and franchise taken in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

CHARLES E. HUGHES, JR.,
Counsel for Petitioner
William Roberts, as Receiver of
Manhattan Railway Company.

CHARLES FRANKLIN,
Counsel for Petitioner
Manhattan Railway Company.

CARL M. OWEN,
J. OSGOOD NICHOLS,
Counsel for Petitioner Interborough
Rapid Transit Company.

HAROLD C. MCCOLLOM,
MARTIN A. SCHENCK,
Counsel for Petitioner Central Hanover
Bank and Trust Company, as Trustee, etc.

GEORGE WELWOOD MURRAY,
Counsel for Petitioner
The Chase National Bank
of the City of New York,
as Trustee, etc.